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No. 86-334

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In the Supreme Court of the United States

OCTOBER TERM, 1986

ENSIGN ELECTRIC DIVISION OF HARVEY HUBBLE INCORPORATED AND UNITED STEELWORKERS OF AMERICA, LOCAL 5925, AFL-CIO-CLC, PETITIONERS

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTIONS PRESENTED

1. Assuming the question is properly presented, whether the court of appeals erred in sustaining the National Labor Relations Board's retroactive application of its decision in *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. 406 (1983), which holds that preferential seniority may not lawfully be extended to union officials who are not involved in grievance processing or other similar on-the-job contract administration duties.

2. Whether bargaining unit employees waive their statutory right to be free of discrimination that encourages union membership by ratifying a collective bargaining agreement which grants superseniority for purposes of layoff to union officers who have no grievance handling or contract administration duties.

3. Whether Section 10(b) of the Act, 29 U.S.C. 160(b), precludes the Board from holding unlawful the enforcement of a superseniority provision that was executed and first implemented more than six months prior to the filing of an unfair labor practice charge.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-8a) is reported at 767 F.2d 1100. The decision of the court of appeals on rehearing (Pet. App. 9a-14a) is reported at 783 F.2d 1121. The decision and order of the National Labor Relations Board (Pet. App. 17a-28a) are reported at 268 N.L.R.B. 620.

JURISDICTION

The judgment of the court of appeals (Pet. App. 15a) was entered on February 19, 1986. A petition for rehearing and suggestion for rehearing en banc was denied on April 1, 1986 (Pet. App. 16a). On June 25, 1986, Chief Justice Burger extended the time for filing a petition for a writ of certiorari to and including July 28, 1986 (Pet. App. 46a). On July 23, 1986, Justice Brennan further extended the time for filing a petition for a writ of certiorari to and including August 29, 1986 (Pet. App. 47a). The petition for a writ of certiorari was filed on August 29, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, United Steelworkers of America, Local 5925, AFL-CIO-CLC, has negotiated collective bargaining agreements on behalf of the employees of petitioner, Ensign Electric Division of Harvey Hubble Incorporated (Ensign Electric), for many years. Pet. App. 30a. These agreements traditionally have required that Ensign Electric lay off employees with the least seniority whenever reductions-in-force are necessary. *Id.* at 30a-31a. Since 1970, however, the agreements have also provided that the "local union president, vice-president, recording secretary, treasurer, and grievance committee shall have preferential seniority in the event of layoff." *Id.* at 30a. Thus, when Ensign Electric had to lay off a large number of its employees between March 1979 and April 1981, the extant collective bargaining agreement (effective February 10, 1979 to October 1, 1981) required Ensign Electric to retain the union's president, recording secretary, and treasurer, even

though these employees had less "natural or earned" seniority than other employees being laid off at the time. *Id.* at 30a-31a. Of these three union officers, only the union president had on-the-job contract administration or grievance processing responsibilities. *Id.* at 31a-34a.

2. One of the employees laid off during the March 1979-April 1981 period subsequently filed an unfair labor practice charge with the National Labor Relations Board (Board),[1] claiming that the preferential seniority clause in effect at the time of his layoff was unlawful. Pet. App. 10a. The Board agreed. *Id.* at 17a-28a. It found that Ensign Electric had violated Section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. 158(a)(1) and (3), and that the union had violated Section 8(b)(1)(A) and (2) of the Act, 29 U.S.C. 158(b)(1)(A) and (2), by "maintaining and enforcing the superseniority clause with respect to the recording secretary and treasurer during * * * [the] March 1980 to April 1981 layoff periods," and by laying off "employees who would not have been affected if the collective bargaining agreement had not accorded * * * [the recording secretary and treasurer] superseniority * * *." Pet. App. 19a-20a.

In so holding, the Board followed (Pet. App. 19a) its earlier decision in *Gulton Electro-Voice, Inc.*, 266

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[1] The employee filed this charge on September 15, 1980, over 12 months after the preferential seniority clause of the February 10, 1979 agreement was first exercised on August 31, 1979. Pet. App. 10a. The Board's General Counsel issued a complaint on November 4, 1980 concerning this charge. *Ibid.* The General Counsel, however, amended his complaint on June 10, 1981, to cover the claims of employees laid off at the time the union's treasurer exercised his right to preferential seniority on April 10, 1981. *Ibid.*

N.L.R.B. 406 (1983), enforced *sub nom. Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d F.2d 1184 (D.C. Cir. 1984). The *Gulton* decision, which overruled the Board's prior decision in *United Electrical Workers, Local 623*, 230 N.L.R.B. 406 (1977), enforced *sub nom. D'Amico* v. *NLRB*, 582 F.2d 820 (3d Cir. 1978), had held that, while "[i]nsuring the enforcement of the collective bargaining agreement by retaining on the job union representatives responsible for processing grievances is a sufficiently compelling reason to allow limited superseniority with respect to layoff and recall to those who perform steward-like duties[,] * * * the stewards' need to maintain an on-the-job presence does not generally apply to officers [and] thus the justification used for stewards does not extend to officers generally—unless the latter perform steward-like duties." *Gulton Electro-Voice, Inc.*, 266 N.L.R.B. at 408. Applying that rationale to the instant case, the Board found that the superseniority clause in petitioners' collective bargaining agreement was unlawful because it did not limit layoff and recall protection to union officers with on-the-job contract administration or grievance handling responsibilities. Pet. App. 19a-20a.

The Board also rejected petitioners' claim that the "6-month limitation proviso to Sec[tion] 10(b) of the Act" immunized this superseniority clause from the Board's scrutiny. Pet. App. 19a-20a & n.8. Though the clause had been ratified and first implemented more than six months before the filing of the unfair labor practice charge (*ibid.*), the Board found that "the consolidated complaint does not attack the execution of the contract * * *" (*ibid.*), but rather "only the * * * maintenance and enforcement of [the] superseniority clause within the applicable [six-month]

period * * *." *Ibid.* Accordingly, the Board found petitioners' "exceptions lacking in merit" (*ibid.*) and ordered, inter alia, that Ensign Electric reinstate the individuals who had been laid off between March 17, 1980, the date on which the six-month period commenced, and April 10, 1981, the date on which lay-offs ceased, and that petitioners jointly and severally make those individuals whole for any resultant loss of earnings. *Id.* at 21a-23a, 25a.

3. The court of appeals upheld the Board's decision and enforced its order. Pet. App. 1a-8a. It sustained the Board's retroactive application of the *Gulton* decision (*id.* at 2a-5a & nn.1, 2), holding that the "considerations governing retroactivity" of judicial and administrative decisions are "strikingly similar" (*id.* at 4a n.1, citing *Chevron Oil Co.* v. *Huson*, 404 U.S. 97 (1971), and *Retail, Wholesale and Department Store Union* v. *NLRB*, 466 F.2d 380 (D.C. Cir. 1972)), and that, because "[t]he question of the extent to which functional union officials [may] be insulated from lay-off in preference to rank and file union members had been debated in a number of cases with vocal dissents[,] * * * it could not * * * be[] said that the law was settled in such a way as to make unjust the retroactive application of *Gulton* in the instant case." Pet. App. 2a-4a (footnotes omitted). On rehearing, the court rejected petitioners' claim that the six-month statute of limitations provision rendered the preferential seniority clause of the February 10, 1979 agreement immune from challenge. *Id.* at 9a-14a. The court reasoned that, "[s]ince the Ensign Electric * * * contract grants super seniority [*sic*] to union officials solely because of their status as union officials, [it] is unlawful on its face [and] no evidence outside the terms of the

contract is required to prove the unfair labor practice * * *." *Id.* at 13a-14a. In these circumstances, the court held, Section "10(b) [of the Act] does not apply." *Ibid.*

ARGUMENT

1. Petitioners first contend (Pet. 10-15) that the court below erred in sustaining the Board's retroactive application of the *Gulton* rule. They do not dispute (*id.* at 10-11 & n.9) that other courts of appeals have analyzed and decided the retroactivity question exactly as the court below did. See, *e.g.*, *NLRB* v. *Wayne Transp., A Div. of Wayne Corp.*, 776 F.2d 745, 750-751 (7th Cir. 1985); *NLRB* v. *Niagara Machine & Tool Works*, 746 F.2d 143, 151 (2d Cir. 1984); *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d 1184, 1186-1189 (D.C. Cir. 1984). Rather, petitioners contend (Pet. 11-15) that the "balancing test" that these courts have employed—which weighs the statutory interest in retroactive application against the surprise and hardship that will result—is inappropriate where, as here, the Board's new rule is only a "permissible," and not a "mandatory," construction of the Act. This contention is not properly presented to this Court for review and, in any event, is in error.

The contention is not open to review by this Court because petitioners have not complied with the requirement set forth in Section 10(e) of the Act for obtaining judicial review. Section 10(e) provides that "[n]o objection that has not been urged before the Board * * * shall be considered by the court,

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[2] Judge Haynsworth dissented as to the retroactivity and limitations period issues. Pet. App. 6a-8a, 14a.

unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances." 29 U.S.C. 160(e). "This Court has interpreted [Section] 10(e) to mean that a Court of Appeals is 'without jurisdiction to consider' an issue not raised before the Board if the failure to do so is not excused by extraordinary circumstances." *EEOC* v. *FLRA*, No. 84-1728 (Apr. 29, 1986), slip op. 4. Indeed, the Court has held that Section 10(e)'s requirements apply even where the Board has raised an issue for the first time in its own decision; in these circumstances, Section 10(e) requires that the objecting party timely present its objections to the Board in a petition for reconsideration or rehearing. See *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 666 (1982); *Garment Workers* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975). Therefore, since petitioners have never presented to the Board their argument against retroactive application of the *Gulton* rule, the court below lacked jurisdiction to consider that argument, and this Court does as well.[3]

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[3] Although the Board briefed and argued the Section 10(e) issue in the court below (see Br. 30-31 (filed Dec. 13, 1984)), the court decided the *Gulton* retroactivity question without addressing the Section 10(e) issue. See Pet. App. 2a-5a.

Two other courts of appeals have explicitly determined that Section 10(e) does not bar courts from determining whether the *Gulton* decision applies retroactively. See *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1191-1194; *NLRB* v. *Wayne Transp., a Div. of Wayne Corp.*, 776 F.2d at 748-750. These courts found that, because the Board may have reason to be aware that unions will object to retroactive application of the *Gulton* rule, Section 10(e)'s policies do not re-

Furthermore, the petition for certiorari raises for the first time in this case the claim that a discretionary construction of the Act may never be applied retroactively. In the court below, petitioners urged only that the surprise and hardship to Ensign Electric and the Union outweighed the statutory interest in retroactive application of the *Gulton* rule; petitioners did not argue below that retroactive application of the *Gulton* rule was *per se* improper because the *Gulton* rule reflects an exercise of discretionary authority by the Board. Petitioners should not be permitted to raise this argument for the first time in this Court. See *EEOC* v. *FLRA*, slip op. 5; *FTC* v. *Grolier, Inc.*, 462 U.S. 19, 23 n.6 (1983); *Youakim* v. *Miller*, 425 U.S. 231, 234-235 n.5 (1976).

In any event, there is no merit to petitioners' argument (Pet. 11 (emphasis in original)) that "a balancing test" for retroactive application of a new rule is appropriate only where "a statute is suscep-

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quire a bar to judicial review. This reasoning, however, does not suffice to remove Section 10(e)'s *jurisdictional* barrier.

Moreover, Section 10(e) requires that parties present the Board with both their objections and their reasons for maintaining these objections. It does so in order that the Board may "bring[] its expertise to bear on the resolution of [the] issues" and efficiently reach fair and informed decisions. *EEOC* v. *FLRA*, slip op. 4. As noted in the text, this requirement applies even where the Board has already issued a holding concerning a particular matter; the objecting party must still file a petition for reconsideration or rehearing with the Board to satisfy the restrictions that Section 10(e) places on the jurisdiction of the courts. *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. at 666. The policies underlying Section 10(e) remain applicable even when the Board knows that a party is likely to object to a particular resolution of an issue; the Board still needs to know the particular reasons for objection.

tible of only one 'correct' construction" and "the agency has previously construed the statute *erroneously* to declare the conduct unlawful," and not where "a statute is susceptible of two 'correct' constructions, and the agency switches from one such construction to the other." Petitioners cite no case holding that an agency interpretation of a statute may not be applied retroactively unless the interpretation is compelled.[4] Rather, as the courts of appeals that have considered the retroactivity of *Gulton* have uniformly concluded (see, in addition to the decision below, *NLRB* v. *Wayne Transp., A Div. of Wayne Corp.*, 776 F.2d at 750-751; *NLRB* v. *Niagara Machine & Tool Works*, 746 F.2d at 151; *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1186-1189), while the nature of the agency's decision may affect the interests to be balanced, the problem remains one of balancing the public's legitimate interest in having the prevailing interpretation of the statute apply retroactively, see generally *Retail, Wholesale & Department Store Union* v. *NLRB*, 466 F.2d at 390, against the hardship to the affected party.

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[4] The cases that petitioners do cite suggest, to the contrary, that the relevant interests are to be balanced. See *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947) (emphasis added) (the "ill effect of the retroactive application of a new standard" must be "*balanced* against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles"); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 295 (1974) (emphasis added) (the question is whether "the adverse consequences ensuing from such reliance *are so substantial* that the Board should be precluded from reconsidering the issue in an adjudicative proceeding"); *Heckler* v. *Community Health Services*, 467 U.S. 51, 60 n.12 (1984) (emphasis added) ("administrative agency may not apply a new rule retroactively when to do so would *unduly* intrude upon reasonable reliance interests").

2. Petitioners next contend (Pet. 15-17) that the bargaining unit employees waived their right to be free of the discriminatory superseniority clause when they ratified the collective bargaining agreement containing that clause. This contention is also without merit.

This Court has made clear that only "economic" rights may be waived in a collective bargaining agreement. See *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693, 705-706 (1983); *NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-326 (1974). Thus, while statutory rights in the economic sphere (such as the right to strike) may be waived by collective agreement (see *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270, 279 (1956)), statutory rights that ensure "the premise of fair representation" are not subject to waiver. *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. at 705-706; see also *Radio Officers' Union* v. *NLRB*, 347 U.S. 17, 47-48 (1954). And, as petitioners concede (Pet. 16-17), every court of appeals to consider the issue has held that superseniority for union officials undermines rights that ensure "the premise of fair representation" and, accordingly, cannot be defended on the basis of waiver. See, *e.g.*, *Local 1384, UAW* v. *NLRB*, 756 F.2d 482, 494 (7th Cir. 1985); *NLRB* v. *Local 1131*, 777 F.2d 1131, 1139 (6th Cir. 1985); *NLRB* v. *Niagara Machine & Tool Works*, 746 F.2d at 150; *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1190.

These courts of appeals have clearly reached the correct conclusion. "The Board has declared superseniority for officers not involved in on-the-job administration of the collective bargaining agreement to be unlawful not because it impairs the natural seniority rights of employees but because it impairs

their right to be free of discrimination that encourages union activism." *Local 1384, UAW* v. *NLRB*, 756 F.2d at 494. "Superseniority presumably encourages employees to become active supporters of the incumbent union in the hope that their efforts will win them union office and, thereby, greater job security." *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1190. This is precisely the kind of coercive conduct that this Court has said cannot be justified by waiver. See *NLRB* v. *Magnavox Co.*, 415 U.S. at 325-326; *Radio Officers' Union* v. *NLRB*, 347 U.S. at 47-48. Petitioners' contention to the contrary (Pet. 16-17) finds no support in the case law.[5]

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[5] Petitioners' claim (Pet. 17) that there is an "apparent inconsistency" between the decisions of the courts of appeals and this Court's decision in *Metropolitan Edison Co.* v. *NLRB*, 460 U.S. 693 (1983), is wide of the mark. In *Metropolitan Edison Co.*, the Court held that a union may waive the right of union officials to refrain from taking affirmative steps to end unlawful work stoppages because that right is "closely related to the economic decision a union makes when it waives its members' right to strike" (460 U.S. at 706). By its own terms, however, the decision in *Metropolitan Edison Co.* does not apply where noneconomic rights—such as the right to be free of discrimination that encourages union membership—are involved. See *id.* at 705-706; see also *Local 1384, UAW* v. *NLRB*, 756 F.2d at 494-495; *Local 900, Int'l Union of Electrical Workers* v. *NLRB*, 727 F.2d at 1190.

Petitioners' suggestion (Pet. 17 n.17) that the Board's decision in *Gem City Ready Mix Co.*, 270 N.L.R.B. 1260 (1984), is inconsistent with its decision here is also erroneous. In *Gem City*, the Board held that a union, as part of the settlement of an economic strike, may waive the seniority rights of its supporters. These rights may be waived because the employees' interests "coincide," and do not "conflict," with the union's interests. *NLRB* v. *Niagara Machine & Tool Works*,

3. Finally, petitioners argue (Pet. 17-18) that the court below erred in holding that Section 10(b) of the Act does not preclude the Board from holding unlawful the enforcement of a superseniority provision that was executed and first implemented more than six months prior to the filing of an unfair labor practice charge. This argument is also in error.

Section 10(b) of the Act provides that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge * * *" (29 U.S.C. 160(b)). This section plainly does not mean that, unless the first instance of unlawful conduct is challenged within six months, all later related unlawful actions are immunized from Board sanction. Here, the only conduct found unlawful—the maintenance and enforcement of the superseniority clause during the March 1980 to April 1981 layoff period—occurred during the six-month period preceding (and the seven-month period succeeding) the filing of the unfair labor practice charge. See Pet. App. 19a-20a & n.8. The Board did not hold unlawful either the execution of the contract or the first exercise of the superseniority clause. See *ibid.* Accordingly, since the contract was unlawful on its face (see page 13, *infra*), the court below clearly did not err in rejecting petitioners' claim that Section 10(b) barred any finding of liability in this case. See *Local Lodge No. 1424, IAM* v. *NLRB*, 362 U.S. 411, 422 n.14, 423 (1960); *NLRB* v. *Local 1131*, 777 F.2d at 1139-1140.

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746 F.2d at 150-151. By contrast, "[s]uperseniority [for union officials] serves the union's interest in encouraging employees to be 'good,' active union members" and directly conflicts with the employees' right to be free of such encouragement. *Id.* at 150. Thus, *Gem City* is consistent with the Board's position here.

Petitioners' claim (Pet. 18) that the decision below conflicts with the decision of the Fifth Circuit in *NLRB* v. *Auto Warehousers, Inc.*, 571 F.2d 860 (1978), is wrong. In *Auto Warehousers, Inc.*, the contract clause at issue was not unlawful on its face; although the clause purported to grant preferential seniority to stewards, the preference was not automatic, but rather depended upon a union's request and the employer's approval. These actions, which constituted the unlawful activity, occurred more than six months before the charge. 571 F.2d at 862-864. By contrast, the contract clause at issue here expressly discriminated against employees for "union related" reasons; under *Gulton*, it was unlawful on its face and constituted a continuing violation of the Act.[6] For that reason, the court below (see Pet. App. 13a) correctly found that the *Auto Warehousers, Inc.* decision is distinguishable.[7]

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[6] Contrary to petitioners' suggestion (Pet. 18), the preferential seniority clause is in fact "unlawful on its face." The clause "grants super seniority [*sic*] to union officials solely because of their status as union officials." Pet. App. 12a-13a. No inquiry into the union officers' duties is necessary in order to find this clause unlawful. Accord *NLRB* v. *Local 1131*, 777 F.2d at 1139, 1140. The clause is overinclusive on its face and thus infringes upon employees' right to refrain from union activities. See *International Harvester Co.*, 268 N.L.R.B. 966 (1984); *United States Steel Corp.*, 268 N.L.R.B. 1187 (1984). Accordingly, it is *per se* unlawful under *Gulton*. Pet. App. 12a-14a; accord, *NLRB* v. *Local 1131*, 777 F.2d at 1140 (reaching the same conclusion and distinguishing *Auto Warehousers, Inc.* on this basis).

[7] The court also pointed out (Pet. App. 13a) that preferential seniority clauses were only presumptively unlawful when the *Auto Warehousers, Inc.* case was decided. Under *Gulton*, of course, such clauses are *per se* unlawful whenever

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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OCTOBER 1986

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they do not, by their own terms, make the grant of preferential seniority dependent on the union officers' duties. See *NLRB* v. *Local 1131*, 777 F.2d at 1140.

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